

6-0400-8786-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF AGRICULTURE

In the Matter of the Suspension
of Permit to Sell Grade A Milk
for Terry I. Kohnen (now Terry Kohnen-
Fleischhacker)

FINDINGS OF FACT,
CONCLUSIONS,
RECOMMENDATION
AND MEMORANDUM

This matter was heard before Allan W. Klein, Administrative Law Judge,
May 24, 1994, in Buffalo, Minnesota.

Appearing on behalf of the Minnesota Department of Agriculture was Paul
Strandberg, Assistant Attorney General, 520 Lafayette Road, Suite 200, St.
Paul, Minnesota 55155-4199.

Appearing on behalf of Terry I. Kohnen-Fleischhacker, the Respondent
herein, was Clyde E. Miller, Miller Law Offices, Ltd., 307 South Main Street
Cambridge, Minnesota 55008.

The record closed on June 10, 1994 upon receipt of the final brief.

This Report is a recommendation, not a final decision. The Commissioner
of Agriculture will make the final decision after a review of the record which
may adopt, reject or modify the Findings of Fact, Conclusions, and
Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the final
decision of the Commissioner shall not be made until this Report has been made
available to the parties to the proceeding for at least ten days. An
opportunity must be afforded to each party adversely affected by this Report to
file exceptions and present argument to the Commissioner. Parties should
contact Commissioner Elton R. Redalen to ascertain the procedure for filing
exceptions or presenting argument.

STATEMENT OF ISSUE

Did Terry Kohnen-Fleischhacker violate Minn. Stat. § 32.21 (1992) so as to justify the suspension of her Grade A permit for a period of 90 days?

Based upon all of the records and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Terry Kohnen is the operator of the Kohnen family dairy operation located near Paynesville. Her parents operated the farm for 21 years. The

farm is a Grade A dairy operation, and has been a long-time member of the First District Association, a privately-owned cooperative company which distributes the Kohnens' milk, as well as the milk of other Association members.

2. On March 29, 1993, Kevin Midtling, a driver for First District Association, picked up a load of milk from the Kohnen farm. After stopping at several other farms, he proceeded to the Schroeder Milk Company plant in North St. Paul. Upon arrival at the plant, each of the two compartments of the tanker (a front compartment and a back compartment) were sampled and a routine test was performed on the samples. The test detected impermissible levels of beta lactam, a member of the penicillin family. Schroeder rejected the entire load, and the driver returned to the First District Association's plant in Litchfield. The next morning, tests at Litchfield confirmed the findings of Schroeder. Tests were then run on the individual producer samples which had been collected by the driver at each farm. These tests identified the Kohnen farm as the supplier of the adulterated milk. The milk was taken to L & L Farms, where it was dumped into a manure pit. Kohnen admits this violation.

3. As a result of this violation, Kohnen was required to pay \$1,551.80. Ex. 9. This was covered by insurance. Ex. 8.

4. On March 31, 1993, the Department sent a certified letter to Kohnen indicating that the violation had occurred, that she would be required to pay a penalty, and that she would be only eligible to sell her milk as Grade B (manufacturing grade) milk until she completed a review of her operations with a licensed veterinarian. Ex. 3.

5. Kohnen does not contest the fact that the first violation occurred. She has identified the source of the antibiotic, which was an ointment used on a cow that had mastitis. Kohnen had followed the directions on the label of the ointment, which was not to use the milk for 48 hours. She waited for several milkings (which is three days, or 72 hours) before using the milk. The persistence of a drug varies from cow to cow and can even vary with the same cow depending upon a variety of factors. Kohnen assumed that following the labeling, and an additional delay, would avoid any problems.

6. Following the detection of the beta lactam in March, Kohnen did meet with her veterinarian, Dr. James Waage, and the two of them reviewed the ten points in the residue prevention protocol. Kohnen also purchased a testing kit from her association.

7. Following the first violation, the Association changed its pickup procedures for the Kohnen farm. The Kohnens were assigned to a new route. Instead of having milk taken directly from the Kohnens to Schroeder's in North

St. Paul, milk from the Kohnens was taken to the First District Association Plant in Litchfield.

8. On June 25, 1993, Michael Teischer, a driver for the First District Association, picked up a load of milk at the Kohnens. It, along with milk from other producers on the route, was taken to the First District Association Plant at Litchfield. The load was tested before it was unloaded from the truck, and a positive test result was obtained with the Charm II test. The sample was retested, and again a positive result was obtained. A second sample was then taken from the truck and the Charm II test again yielded a

positive result. The First District Association lab manager, Doug Anderson, then tried a different test, known as the Delvo P test, which also yielded a positive result. Then, the individual samples taken from each producer were tested. The Charm II test was positive for the Kohnen sample, but for no other sample. A retest of the same sample yielded the same result. The truckload was taken to L & L Farms, and was dumped there.

9. On June 25, Jack Ulrich, a First District fieldman, went to the Kohnen farm and tested milk from the bulk tank on the farm. It tested negative. However, he determined that the contaminated milk had come from a cow being treated with a mastitis tube. Terry Kohnen's brother, Jim, was milking the cows and he and his mother determined that the cow being treated had been "off-line" long enough. They assumed the milk could be put in the bulk tank. Neither the cow which had been treated, nor the mixed milk in the bulk tank were tested prior to being loaded onto the truck. The Kohnens had purchased a Delvo P test kit from First District Association after the March violation. However, they did not use it unless there was a question about a particular cow. On June 25, they did not use it.

10. Terry Kohnen was not in the barn at the time, because of an injury to her neck. Her injury occurred on May 24, 1993, surgery was required, and she did not go back to regular work in the barn until January of 1994. Her neck was immobilized in a "halo" brace.

11. On June 29, 1993, Veterinarian Waage again went through the ten-point program with Terry and her mother, Alicia Kohnen.

12. Following the second violation, Kohnen purchased a Penzyme test kit from the First District Association.

13. Because of the consequences that would flow if there were a third violation in a 12-month period, Jack Ulrich set up a meeting on August 10 in Paynesville between the Kohnens and persons from the Department of Agriculture. Participating in this meeting were Terry Kohnen and Art Holdvogt, Mike Krim, Jack Ulrich and Harvey Eckman. Holdvogt, Krim and Eckman are with the Minnesota Department of Agriculture. The meeting lasted about one and a half hours, and departmental personnel explained the seriousness of a third violation.

14. On November 3, 1993, Mike Teischer again brought a tanker load to First District Association which contained milk from a number of producers, including Kohnen. The load was tested, and it indicated a positive result. It was retested, and again gave a positive result. The individual producer samples were then tested, and the sample from Kohnen's farm yielded a positive

result. Initial tests were with a Charm II test, while the followup was with a Delvo P test. Both tests yielded a positive result for Kohnen's sample. Ex 7. The load was again taken to L & L Farms and disposed of.

15. Jack Ulrich telephoned Terry Kohnen in the evening of November 3, indicating that a third violation had been detected. Kohnen was very surprised to hear this, because she was not aware that any cows were being medicated at that time. However, Kohnen was not in the barn on a daily basis because of a neck injury. Her sister and brother-in-law had been responsible for milking that day. However, after Ulrich's call, Terry and other family members immediately went out to the barn to see if they could

determine what had caused the problem. They ran a test the next morning, and found no violation. Jack Ulrich came out to the farm the next day, and tested and he also found no violation. Kohnen speculates (but is not sure) that a possible source for the contamination might have been moldy hay. However, there has been no test of the hay to verify this possibility. While Kohnen readily admits that the first two violations did occur as a result of premature reinstatement of medicated cows, she does not to this day know what caused the third violation.

16. On November 8, the Department sent a certified letter to Kohnen, indicating that she must pay civil penalties equal to the minimum value of 30 days' milk production, that she would be eligible only to sell Grade B milk until completing the ten-point veterinary program, and that the Commissioner would initiate administrative procedures to revoke her permit or certificate to sell milk for 30 days. The only way she could avoid the administrative procedure would be to voluntarily discontinue marketing for 30 days. Ex. 7

17. Kohnen did complete the ten-point veterinary program, again with Dr. Waage.

18. Following the November 3 violation, Kohnen began a program of daily testing, and once got a positive test. She fed the milk to pigs.

19. The sampling protocols, testing procedures and verification methods used at the time of the three positive tests cited by the Department were all valid. In each of the three instances, milk from the Kohnen farm was contaminated with beta lactam.

20. None of the contaminated milk was consumed by the public. In each case, either the Schroeder plant or the First District Association rejected the milk, and it was disposed of. The Kohnens did not sell to the public directly. All their sales were through the Association.

21. Kohnen's insurance covered the cost of the first two violations. However, the insurance was cancelled after the second violation, and Kohnen paid a net out-of-pocket amount of \$6,969.39 as a result of the three violations. In addition, Kohnen has paid \$90 for inspection fees and an unknown amount for veterinarian fees.

22. On April 22, 1994, Commissioner Elton R. Redalen issued a Notice and Order for Hearing, setting a hearing in this matter for May 24. In the Notice, the Commissioner indicated that while the statute would allow a total ban on the sale of Kohnen's milk for 30 days, the Department was seeking only a downgrading of Kohnen's milk from Grade A to Grade B, to last for a period of

90 days. In other words, Kohnen would be able to sell her milk, but it would have to be sold as Grade B milk, for a period of 90 days.

Based upon the foregoing Findings, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Minnesota Department of Agriculture and the Administrative Law Judge have jurisdiction over the subject matter of this proceeding pursuant to Minn. Stat. §§ 14.57-14.62, 32.021 and 32.21.

2. The Minnesota Department of Agriculture gve proper notice of the hearing in this matter and has fulfilled all relevant substantive and procedural requirements of law or rule. The Department has the authority to take the action proposed.

3. The burden of proof is upon the Department, which must prove the charges at issue by a preponderance of the evidence. Minn. Rules, pt. 1400.7300, subp. 5; Application of City of White Bear Lake, 311 Minn. 146, 1 N.W.2d 901, 904 (1976). See also, Beck, Bakken & Muck, Minnesota Administrative Procedure (Butterworths, 1987) at section 9.3.2.

4. Kohnen did violate Minn. Stat. § 32.21, subd. 3(7) (1992) three times during a 12-month period. She is, therefore, subject to the penalties of subdivision 4(d).

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that Terry Kohnen-Fleischhacker's permit to sell Grade A milk be suspended for a period of 90 days.

Dated this 12th day of July, 1994.

s/ Allan W. Klein
ALLAN W. KLEIN
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Tape Recorded (two cassette tapes)

MEMORANDUM

Terry Kohnen admitted the first two violations. She could identify what medication had been given to which cow on which day. She (or in the case of the second violation, her mother) relied upon labeling directions to determine when it was safe to sell the milk. Kohnen understands that this was wrong, it is likely that the next time medication is administered, each medicated cow will be individually tested before the milk is put in the tank.

The third violation, however, is different. No one knows how the medicine got into the milk. However, the statute does not require proof of causation. All that matters is that the drug residues were in the milk.

Kohnen argues that she did not violate the statute because there has been no "sale" within the meaning of the statute. The statute, in subdivision 1, provides that a person may not sell (or knowingly buy) adulterated dairy products. Kohnen argues that delivery to the Association's pickup tanker is not a sale for human consumption, and that a sale must be for human consumption before the statute is triggered. Taking the first violation, for example, Kohnen claims that the "sale" would have occurred only if the milk had been delivered to Schroeder's and accepted by them. Since Schroeder rejected the load, Kohnen argues there was no "sale". Similarly, for the second violation, the transportation in the Association's tank trucks to the Association's Litchfield plant does not violate the statute, in the eyes of Kohnen.

The Department, on the other hand, believes that the statute is violated as soon as an individual is identified as a source of adulterated milk. The Department argues that subdivision 4 of the statute provides a separate basis for proceeding against Kohnen, and that it doesn't matter if there was a "sale" or not. Subdivision 4, in paragraph (d), provides that a producer's shipment of milk must be immediately suspended if the producer is identified as an individual source of milk containing residues, and that shipment may resume only after subsequent milk has been sampled and found to contain no residues above the established tolerances. The paragraph goes on to provide that a producer who violates subdivision 3, clauses 6 or 7, is subject to penalties provided in the paragraph. For purposes of the Department's position, therefore, the question of when a "sale" occurs is irrelevant.

Kohnen argues that the Department's position is absurd because every farmer milks cows which it knows to have drug residues, but then dumps the milk without selling it. Kohnen argues that if a sale is not required, then those farmers would all be in violation just by possessing adulterated milk.

The Department, on the other hand, argues that Kohnen's requirement for a "sale" for human consumption is an absurd requirement because the whole focus of the law is to prevent adulterated milk from entering the stream of commerce.

The Administrative Law Judge notes that the statutory section at issue has been in existence since at least 1921, and has been amended six times since then. It is no longer a model of clarity. Nevertheless, a fair reading of the subdivisions makes it clear that the Department's position is correct. For example, subdivision 2 prohibits the manufacture of food for human consumption from adulterated milk or cream, and then sets forth a detailed

process for testing and identifying the source of adulterated products. The statute requires that prior to processing, all bulk milk pickup tankers must be tested for beta lactam drug residues. Tankers testing positive must be reported to the Commissioner within 24 hours. The report must include how and where the milk was disposed of, the responsible producer, and the possible cause of the residue. Record-keeping requirements are imposed, and the statute's reach is extended to producers who deliver milk in other than a pickup tanker. Subdivision 4(d) provides for immediate suspension for a producer identified as a source of adulterated milk, and goes on to require that a producer who violates relevant portions of the

adulteration definition is subject to specified penalties. As the Administrative Law Judge reads the statute, as a whole, it is clear that Kohnen is subject to the penalties provided.

That subdivision 4 provides a separate basis for enforcement can be seen most clearly by an examination of the 1992 session law which added the provisions relied upon by the Department. That session law, Laws 1992, Chapter 602, added the requirement for testing bulk tank trucks, and also added the penalty provisions of subdivision 4(d). It is clear that the two go together and that penalty provisions do not rely on a violation of subdivision 1. They operate independently of subdivision 1.

The Administrative Law Judge has not answered the question of whether or not delivery to the Association's tanker constitutes a "sale" for purposes of subdivision 1, because it is unnecessary to reach that issue in light of the analysis of violations occurring under subdivision 4.

This reading of the law is not unfair to Kohnen in the sense that it is how the Department proceeded in terms of warning her. It is how she understood the warnings and accepted the penalties imposed, up to the last violation. That the Department is now proceeding to suspend her license for Grade A milk comes as no surprise to her. It is exactly what she was told would happen in the event of a third violation. Those warnings came both in letters and in a personal meeting where three departmental personnel tried to impress her with the seriousness of the situation. Unfortunately, due to her neck injury, she was not able to supervise the barn and the many people working there. All that was needed was a daily testing program. For whatever reason, that was not done, and now Kohnen must bear the consequences.

AWK

